IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 8.9.2006

CORAM:

THE HONOURABLE MR.JUSTICE M.THANIKACHALAM

WRIT PETITION No.11009 OF 2006,
W.P.M.P.No.12516 OF 2006
AND W.V.M.P.No.1118 OF 2006

M/s.Kamaldeep Synthetic Ltd.,
by Managing Director V.Nandakumar ... Petitioner

Vs.

Industrial Development Bank of India Ltd.,
by Deputy General Manager,
the Authorised Officer,
115, Anna Salai,
Saidapet,
Chennai-600015. ... Respondent

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari to call for the records of the respondent in proceedings dated 20.2.2006 and quash the same.

For petitioner : Mr.T.L.Ram Mohan, S.C. For
M/s.J.Anandhavalli and
G.Sumitra
For respondent : Mr.N.V.Srinivasan for
M/s.N.V.S. & Associates

O R D E R

By the consent of either counsel, the main writ petition itself is taken up for final disposal.

2. The brief facts,leading to this writ:

(a) The writ petitioner, for the purpose of manufacture and marketing of all kinds of man-made fibers in various forms, being a qualified entrepreneur, approached the respondent Bank, for term loan, in the year 1992. After much effort, financial assistance was provided to the petitioner and this petitioner also executed several documents and performed several acts, as set out in the

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Letter of Intent (in short 'LOI') dated 20.5.1993. Because of the respondent's involvement, not only directing the petitioner to nominate its members, but also vetted and approved the names of independent Directors, thereby securing majority for its nominee and independent Directors, effectively and factually interfered in all the affairs of the petitioner company, resulting financial restrain to meet several commitments. The failure of the Marketing Agency of the respondent Officers to lift the 70% production, from the beginning of 1994, curtailed production gradually, which affected flow of funds. When the petitioner approached the respondent with promoters, the respondent refused to take back the investment with interest, demanding that they should be paid 15% of the total investment, as 'Premium'.

(b) The LOI signed between the parties has not vested any right on the respondent to invoke Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (Act 51 of 1993) (hereinafter called as 'Act 51 of 1993'), for re-calling their investments. However, without jurisdiction, the respondents have filed O.A.No.960 of 1998, claiming a huge amount of Rs.43,35,56,908/=, before the Debts Recovery Tribunal-I, Chennai.

(C) The petitioner received a notice dated 20.12.2005, purported to be under Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Act 54 of 2002) (hereinafter called as 'SARFAESI Act'), threatening initiation of proceedings, for which reply was given on 16.2.2006. The respondent claims to have exercised power under Section 13(4) of the SARFAESI Act, taking possession of the property, which is illegal, void, which caused grievance to the petitioner. Therefore, he is constrained to file this writ, questioning the validity of the notice issued under Section 13 (4) of the SARFAESI Act, since the petitioner is having no other alternative remedy, except to approach this Court for issuance of writ of Certiorari, under Article 226 of the Constitution of India.

3. This writ petition is opposed by the respondent, by filing a detailed counter on the following grounds:

(a) The writ petition itself is not maintainable, either in law or on facts, and therefore, the same is liable to be dismissed in limine. The petitioner defaulted in repayment of the principal amount of the loans and in payment of interest and other moneys in terms of the relevant loan agreement entered into by it with the respondent and therefore, the respondent filed a recovery application against the petitioner and others before the Debts Recovery Tribunal, Chennai (in short 'DRT') in O.A.No.960 of 1998, claiming a sum of Rs.6,67,56,908/= as on 31.3.1998

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together with further interest and other moneys at agreed rates thereon till realisation.

(b) The Government of India, promulgated a new legislation viz. SARFAESI Act, for the speedy recovery of the amounts due to the financial institutions and therefore, considering the long pendency of the case before the DRT, the respondent decided to take recourse to the provisions of the SARFAESI Act. Accordingly, as contemplated under Section 13(2) of the SARFAESI Act, a notice was issued on 20.12.2005, to the petitioner, which emanated a reply.

(C) After verification, the Authorised Officer of the respondent took possession of the secured assets on 20.2.2006 in terms of Section 13(4) of the SARFAESI Act. In the meantime, a memo. has been filed before the DRT, for keeping the O.A. in abeyance, since withdrawal may not save the limitation, in case, if it is found later, any amount is due from the petitioner, for which there cannot be any separate proceedings.

(d) In terms of Section 17 of the SARFAESI Act, the petitioner had the right to appeal in DRT, having the jurisdiction against the action taken by the respondent under Section 13(4) of the SARFAESI Act. The petitioner, having failed to prefer an appeal, is not entitled to invoke Article 226 of the Constitution of India, as if there is no alternative remedy.

(e) In terms of Section 34 of the SARFAESI Act, no injunction can be granted by any Court or other Authority, in respect of any action taken or to be taken, in pursuance of any power conferred by or under the SARFAESI Act. Suppressing the above fact, the petitioner has obtained stay, in a manner injurious to the respondent and caused untold hardship and therefore, the interim direction need to be vacated.

(f) Section 35 of the SARFAESI Act is having over-riding effect and therefore, the action taken under SARFAESI Act is correct and in accordance with law and on this ground also, the writ petition is not maintainable. The petitioner, instead of approaching the Tribunal, in terms of Section 17 of the SARFAESI Act, circumventing the provisions of law and committing inequity, invoked the writ jurisdiction of this Court, which he is not entitled to do so. For all these reasons, the writ petition is liable to be dismissed.

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4. In the reply affidavit, denying the averments in the counter, the writ petitioner would state, among other grounds, that the respondent cannot invoke the provisions of SARFAESI Act, without withdrawing the O.A. pending before the DRT and that when the right of the respondent itself, to proceed under SARFAESI Act, itself is questioned, the remedy available for the petitioner is only under Article 226 of the Constitution of India and not under Section 17 of the SARFAESI Act, where appeal is provided, if the action is otherwise legal, thereby praying to allow the writ petition, granting the reliefs sought for.

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5. Heard Mr.T.L.Ram Mohan, learned senior counsel for the writ petitioner and Mr.N.V.Srinivasan, learned counsel for the respondent Bank.

6. It is not in dispute, at present, that the writ petitioner availed financial assistance from the respondent, for the purpose of running the industry. It is also an admitted fact that the properties, belonging to the petitioner company, were hypothecated or secured for the loan advanced. Though the petitioner had availed the loan, elsewhere in the year 1993 or so, it seems, the writ petitioner has not paid the amounts, as agreed, or as undertaken, as per the LOI. Because of the failure on the part of the borrower, to pay the amount, admittedly, the respondent Bank filed O.A.No.960 of 1998 before the DRT, Chennai for the realisation of a sum of Rs.6,67,56,908/= as on 31.3.1998 together with further interest and other moneys at agreed rates thereon till realisation. When the matter was pending before the DRT, where the amount also appears to be disputed by the petitioner, raising counter claim also, the SARFAESI Act came into force, where provisions are made for speedy recovery of the secured amount, invoking Section 13 therein. The respondent Bank unable to realise the amount as expected, thought it fit, to invoke Section 13 of the SARFAESI Act, and in this way, a notice was issued under Section 13 (2) of the SARFAESI Act on 20.12.2005, calling upon the borrower/the writ petitioner to repay the amount mentioned in that notice viz. Rs.33,00,93,186/=, giving sixty days time, as contemplated under the provision, from the date of receipt of the said notice, which elicited a reply also from the writ petitioner.

7. Admittedly, responding to the above said notice, the writ petitioner has not paid any amount. Therefore, exercising the right and power given under Section 13(4) of the SARFAESI Act, a notice was issued, to the borrower and the public, informing that the Authorised Officer of the respondent Bank had taken possession of the properties, on 20.2.2006, which is under challenge in this writ petition.

8. Mr.T.L.Ram Mohan, the learned senior counsel appearing for the writ petitioner, submitted that the notice issued under Section 13(4) of the SARFAESI Act preceded by Section 13(2) notice, without withdrawing the Original Application filed by the respondent before the DRT, is not only illegal but also against Law declared and in this view, the same is liable to be set aside. The basis for setting aside notice under Section 13(4) of the SARFAESI Act, as understood from the reading of the affidavit, is that the respondent has no jurisdiction, basically to adopt this course, and when, without any jurisdiction a notice has been issued, or it is said possession has been taken pursuant to the same, that can be challenged under Article 226 of the Constitution of India.

9. Responding to the above submissions, the learned counsel for the respondent would submit that the writ petition itself, as such, is not maintainable, since the petitioner is having an alternative remedy, to

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question the notice under Section 13(4) SARFAESI Act before the DRT and without availing that alternative remedy, the petition filed, invoking the writ jurisdiction before this Court, deserves to be rejected. It is the further submission of the learned counsel for the respondent that there is no mandate in the Act 51 of 1993, that in order to invoke the provisions under the SARFAESI Act, the O.A. filed before DRT should be withdrawn and even keeping the O.A. pending or kept in abeyance at least, Section 13 of the SARFAESI Act could be invoked, since the very purpose of SARFAESI Act is for speedy recovery of the amounts and in this view, the non-withdrawal of O.A., before initiating the proceedings under SARFAESI Act, cannot be a ground to question the right conferred on the financial institutions under Section 13 of the SARFAESI Act, which was properly exercised by the respondent. In support of their respective submissions, both sides have invited my attention to a catena of decisions for and against. I have carefully gone through the judgments relied on by either counsel and also applying the mind, analysed the case, based upon the provisions of law as well as the judicial precedents, leading to the conclusion hereunder.

10. The main thrust of the learned senior counsel for the writ petitioner is on the bar, that without withdrawing the O.A. filed by the respondent before the DRT, invoking the provisions of Section 13 of the SARFAESI Act is not permissible and therefore, this Court has every power to set aside the illegality to meet the ends of justice. In this context, we have to see, what are the powers conferred on the financial institutions, under Section 13 of the SARFAESI Act and what is the mandate of Section 19 of the Act 51 of 1993.

11. The right of the respondent Bank to invoke Section 13 of the SARFAESI Act cannot be challenged at present and the power is no doubt vested with them. It is also an admitted fact, a notice has been issued under Section 13(2) of the SARFAESI Act to the borrower by the secured creditor. Section 13(4)(a) of the SARFAESI Act reads:

> "(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-
> (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;"

Thus, this Section empowers the secured creditor to take recourse viz. taking possession of the secured assets of the borrower, including the right to transfer, by way of lease etc. Exercising this power conferred under Section 13(4) of the SARFAESI Act, the impugned notice is issued by the respondent to the petitioner. In view of the admitted position, the respondent/Bank had already filed O.A. before the DRT, Chennai, we have to see, whether, without withdrawing that O.A., the respondent/Bank could

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exercise the power conferred under Section 13(2) or 13(4) of the SARFAESI Act, as the case may be.

12. Proviso (i) to Section 19(1) of the Act 51 of 1993 reads:

> "Provided that the bank or financial institution may, with the permission of the Debts Recovery Tribunal, on an application made by it, withdraw the application, whether made before or after the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 for the purpose of taking action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), if no such action had been taken earlier under that Act." (emphasis supplied)

By going through the purpose of this Section, the word 'may' used, should have the meaning of 'shall', thereby making it more or less mandatory, that the Bank or the financial institution, as the case may be, should withdraw the Original Application, whether filed before or after the enforcement of the SARFAESI Act, for the purpose of taking action under the SARFAESI Act. If withdrawal of O.A. pending before the DRT is not a must, there is no meaning at all, in introducing this provision, directing the borrower to approach DRT for withdrawal. The submission of the learned counsel for the respondent, that this provision is not mandatory, that too, in view of the wordings used therein viz. 'may' and it is only directory, appears to be not well founded, because of the law, at present, settled by a Division Bench judgment of this Court in DIGIVISION ELECTRONICS LTD. vs. INDIAN BANK (2005(3) CTC 513).

13. The ratio laid down by the Division Bench of this Court in Digivision Electronics case is relied on by either counsel. As seen from paragraph Nos.28 and 29 of the said Ruling, it is to be held, that the petition under Section 19(1) of the Act 51 of 1993 should be construed as mandatory, failing which, there will be no meaning in inserting provisos (i) to (iii) to Section 19(1) of the Act 51 of 1993, by way of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 (Act 30 of 2004) with effect from 11.11.2004. Whether notice under Section 13(2) of the SARFAESI Act is issued before 11.11.2004 or after 11.11.2004, both the way, the Division Bench of this Court has considered the effect of 19(1) of the Act 51 of 1993 wherein it is held in paragraph No.28:

> "Hence, in our opinion, if notice under Section 13(2) had been issued prior to 11.11.2004, there is no requirement to take permission from the Debts Recovery Tribunal for withdrawal of an application pending before it. It is only where notice under Section 13(2) is sought to be issued subsequent to 11.11.2004 that permission for withdrawal of an application pending before the Debts Recovery Tribunal is necessary and no action can be

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taken under the Securitisation Act before grant of such permission by the Tribunal."
(emphasis supplied)

14. Then, taking the case of issuance of notice after 11.11.2004, where it was contended that even where notice under Section 13(2) of the SARFAESI Act was issued after 11.11.2004, action under the Securitisation Act can be taken, without getting permission from the Debt Recovery Tribunal, to withdraw an application pending before it, it is held in paragraph No.29:

"If we accept such an interpretation, it will make the proviso to Section 19(1) meaningless and purposeless. Hence, it has to be held that it is a necessary implication of the proviso that where notice under Section 13(2) of the Securitisation Act is sought to be issued after 11.11.2004, permission of the Tribunal is required for withdrawing an application pending before it, and without such permission no action can be taken under the Securitisation Act."

This ratio I have to follow in this case, since as on this date, the ratio laid down by the Division Bench is ruling the roster, though it is said, it is under challenge before the Apex Court.

15. As held by the Division Bench of Punjab and Haryana High Court in KALYANI SALES COMPANY & ANOTHER vs. UNION OF INDIA & ANOTHER [I (2006) BANKING CASES 1], 'once Bank decides to proceed under Act, Act imposes obligation on Bank or financial institution to withdraw an application under Section 19 of RDB Act', thereby giving statutory recognition to the doctrine of election , contemplating that one remedy alone can be taken/availed in respect of one action, when provisions are available under both the Acts, for the same remedy. On the basis of this decision also, it is to be held, the withdrawal of O.A., pending before the DRT, before proceeding under SARFAESI Act is a must.

16. Admittedly, the respondent Bank has not filed any application, invoking Section 19(1) of the Act 51 of 1993 before the DRT, seeking permission to withdraw the O.A., for the purpose the invoking the provisions of SARFAESI Act. Therefore, it is to be held, that without withdrawing the O.A., pending before the DRT, the notices issued under Section 13(2), followed by 13(4) of the SARFAESI Act are, prima facie, incorrect, not in tune with Section 19(1) of Act 51 of 1993, as well as the ratio laid down by the Division Bench of this Court in Digivision Electronics case. In this view, it is to be held, the notice, issued under Section 13(4) of the SARFAESI Act, also not valid, since there is a basic violation of Section and therefore, exercising the jurisdiction under Article 226 of the Constitution of India, this Court can interfere with, since it offended Section 19 of the Act 51 of 1993 making the notice under Section 13(4), preceded under Section 13(2) of the SARFAESI Act, issued or

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initiated without jurisdiction and on this ground, it can be set aside, of course, giving liberty to the respondent Bank to follow the correct procedure, if they chose.

17. It is submitted on behalf of the respondent/Bank that a memo. has been filed before the DRT, praying to keep in abeyance the Original Application No.960 of 1998, since the provisions under the SARFAESI Act have been invoked and therefore, as such, there is no parallel proceedings proceeded and in this view, maintaining the proceedings under Section 13 (4) of the SARFAESI Act is sustainable. Considering the specific provisions of the SARFAESI Act, which contemplate withdrawal of the OA pending before the DRT, prior to initiating the proceedings under the SARFAESI Act, keeping in abeyance the proceedings pending before the DRT, will not be the compliance of Section 19(1) of the Act 51 of 1993 and on this ground, in my considered opinion, invoking Section 13(2), followed by 13 (4) of the SARFAESI Act, also appears to be legally unsustainable.

18. The learned counsel for the respondent would submit that if the OA is withdrawn, for the purpose of invoking the rights or power conferred under Section 13 of the SARFAESI Act, in case, at later stage, if it is found that the amount realised from the security is insufficient to discharge the debt, there may not be any possibility, for the secured creditors, to realise the amount, invoking Section 13(10) of the SARFAESI Act, since there is no protection or exemption from the Limitation Act and in this view, it is not mandatory. Section 13(10) of the SARFAESI Act reads:

> "Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application, in the form and manner as may be prescribed, to the Debts Recovery Tribunal having jurisdiction or a competent Court, as the case may be, for recovery of the balance amount from the borrower."

19. As per the mandate of Section 36 of the SARFAESI Act, 'no secured creditor shall be entitled to take all or any of the measures under sub-section (4) of section 13, unless his claim in respect of the financial asset is made within the period of limitation prescribed under the Limitation Act, 1963 (36 of 1963)', thereby indicating, when an action has been taken under Section 13(4) of the SARFAESI Act, that must be within the period of limitation, prescribed under the Limitation Act. When the secured creditor invokes Section 13(10) of the SARFAESI Act, after exhausting the remedies, the starting period of limitation may be different and therefore, presuming or construing, that there is no safeguard to invoke Section 13(10) of the SARFAESI Act, it is not possible to say, that withdrawal of O.A., contemplated under Section 19(1) of the Act 51 of 1993 pending before the DRT, is not mandatory, whereas it is only optional or directory. In view of the Division Bench ruling of this Court, cited supra, it is mandatory. Therefore, to accept the

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submission of the learned counsel for the respondent, that Section 19(1) of the Act 51 of 1993 is not mandatory, is not acceptable to me. In the light of the above discussion, without withdrawing the O.A. already filed before the DRT and without exercising the option, to elect either the proceedings under Section SARFAESI Act or under Act 51 of 1993, the respondent Bank is not entitled to proceed under both the Acts simultaneously, since the purpose of the proceedings under both the Acts is one and the same, which remedy is not made available to the financial institutions or Banks, simultaneously because of the provisos to Section 19(1) of the Act 51 of 1993.

20. Section 17 of the SARFAESI Act confers power upon a person, including a borrower, if aggrieved by the action taken under Section 13(4) of the SARFAESI Act, to prefer an appeal to the DRT, having jurisdiction in the matter within forty-five days from the date on which such measures had been taken. The impugned notice dated 20.2.2006 is the measure taken under Section 13(4) of the SARFAESI Act. On the basis of the right available to the borrower, under Section 17 of the SARFAESI Act, the learned counsel for the respondent argued that when there is alternative, efficacious remedy available to the aggrieved person viz. the writ petitioner, he ought to have approached the DRT by preferring appeal and instead of doing so, invoking the writ jurisdiction of this Court is not maintainable, inviting my attention to various decisions of this Court, as well as the Apex Court, which I will advert to infra.

21. Section 17(2) of the SARFAESI Act prescribes the duty of the DRT, as follows, in case of appeal:

> "The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder."

The above Section would indicate, the DRT is not entitled to look into other matters, such as invoking Section 13(2) or 13(4) of the SARFAESI Act, without withdrawing the application pending before DRT, is either illegal or maintainable or not. The only aspect, the DRT shall consider is, whether the measures referred to in Section 13(4) of the SARFAESI Act, taken by the secured creditor, are in accordance with the provisions of SARFAESI Act and the Rules made thereunder, and not with reference to any other Act such as Act 51 of 1993. If all the powers, to decide beyond the scope of Section 13(4) also had been given to the DRT, then, it could be said, emphatically also, that Section 17(2) of the SARFAESI Act provides efficacious remedy to the aggrieved party, even to challenge the non-withdrawal of OA and invoking Sections 13(2) and 13(4) of the SARFAESI Act. But, as contemplated under Section 17(2) of the Act 51 of 1993, the DRT is not competent to go beyond the measures referred to in sub-section (4) of Section 13 of the SARFAESI Act. This being the position, as

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understood by reading Section 17 of the Act 51 of 1993, in my considered opinion, it cannot be said, that an efficacious remedy is made available to challenge Section 13(4) notice as invalid or violative of the law, on the ground of non-withdrawal of O.A., pending before the DRT. In this view also, it is to be held that the petitioner knocking the doors of this Court, invoking Article 226 of the Constitution is proper and as such, it cannot be said, the writ petition itself is not maintainable or without jurisdiction.

22. In paragraph No.47 of the Digivision Electronics case, the Division Bench of this Court, while summarising their conclusions has held:

> "(3) Where the challenge is to the action under Section 13(4) of the Securitisation Act, this challenge is also rejected on the ground of alternative remedy of filing application under Section 17 of the Securitisation Act."

Thus indicating, the discretionary remedy of writ jurisdiction is not available, when the proceedings initiated under S.13 of the SARFAESI Act are basically valid and correct. In paragraph No.46 of the said judgment, placing reliance upon the Apex Court rulings and other rulings, the Division Bench has observed:

> "Writ is a discretionary remedy, and hence, this Court under Article 226 is not bound to interfere even if there is a technical violation of law.... To obtain a writ, the petitioner must not only show that the law is in his favour, he must also show that equity is in his favour. In these cases, even assuming that there is some technical violation of law, there is no equity in the petitioners' favour."

It is demonstrated here, how the action taken under S.13 of the SARFAESI Act is without jurisdiction, thereby establishing the law is in favour of the petitioner and when it is offended or infringed, the Court should protect, making the writ jurisdiction available.

23. For the reasons assigned by me supra, as contemplated under Section 19 of Act 51 of 1993, without withdrawing the O.A., which law is in his favour, the issuance of the notice under Section 13(4) of the SARFAESI Act, by the respondent Bank appears to be not proper and in this view, to set it right, the writ is to be maintained. On the other hand, if the respondent had withdrawn the O.A., as indicated in paragraphs No.28 and 29 of the Digivision Electronics case, then, there would not have been any difficulty for me, to say authoritatively, that the writ petition is not maintainable, considering Section 17 of the SARFAESI Act. Because of the non-withdrawal of the O.A., there is a violation of law and to rectify that violation, certainly, invoking Article 226 of the Constitution of India, is a must.

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24. In PNL DEPOSITORS' WELFARE ASSOCIATION vs. UNION OF INDIA (2005 (4) CTC 469), this Court, based upon Digivision Electronics case, has ruled that 'when the petitioner is having an efficacious alternate remedy under SARFAESI Act, he will have to move the Debts Recovery Tribunal under Section 17 of that Act and therefore, the writ petition therein is not maintainable.' In the case involved in the above decision, only Section 17 of the SARFAESI Act was considered and non-compliance of proviso(i) to Section 19(1) of the Act 51 of 1993 was not considered. Therefore, on facts, the above ruling is distinguishable, and this will not come to the aid of the respondent, to reject the writ petition as not maintainable.

25. Aid is sought from MARDIA CHEMICALS LTD. ETC. ETC. vs. UNION OF INDIA AND OTHERS ETC. ETC. [AIR 2004 SC 2371 = (2004) 4 SCC 311] wherein also, the Apex Court has ruled:

> "When appeal provision is available under Section 17 of the SARFAESI Act as the safeguard, against the action taken under Section 13(4) of the SARFAESI Act, the party has to approach the DRT."

In the said ruling also, it seems, Section 19(1) of the Act 51 of 1993 and the provisos available therein, for withdrawal of O.A. pending before the DRT, were not the subject matter and in this view, that Ruling also fails to come to the rescue of the respondent, to reject the writ petition, as not maintainable.

26. The Apex Court, in ANDHRA PRADESH STATE FINANCIAL CORPORATION vs. M/s.GATR RE-ROLLING MILLS AND ANOTHER [AIR 1994 SC 2151 = (1994) 2 SCC 647] had the occasion to consider the question 'whether the Financial Corporation set up under Section 3 of the State Financial Corporation Act ... is entitled to take recourse to the remedy available to it under Section 29 of the Act, even after having obtained an order or a decree, after invoking the provisions of Section 31 of the Act, but without executing that decree/order?" and answered the same in paragraph No.19 of the judgment as follows:

> "The right vested in the Corporation under Section 29 of the Act is besides the right already possessed at common law to institute a suit or the right available to it under Section 31 of the Act. Since, the Corporation can withdraw from the Court its proceedings under Section 31 of the Act at any stage, it would imply that it has the right to withdraw from further proceedings under Sections 31 and 32 of the Act even after obtaining an order in its favour and take recourse to the proceedings under Section 29 of the Act without pursuing the proceedings under Section 31 of the Act any further. The Corporation cannot, indeed, execute the order under Section 31 of the Act and yet simultaneously take recourse to proceedings under Section 29 of the Act for the same relief. The position may also be different if the claim of the

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> Corporation is negatived, on facts, by the Court in the proceedings under Section 31 of the Act. In that event, depending upon the facts of each case, it may be permissible to hold that fair play and justice demand that the Corporation is not allowed to take recourse to the provisions of Section 29 of the Act. Thus from the above discussion, it follows that the answer to the question posed in the opening part of the judgment is in the affirmative."

From the above passage, it is seen, the Corporation can withdraw, from the Court, its proceedings under Section 31 of the State Financial Corporation Act, at any stage, thereby implying that it has the right to withdraw from further proceedings, even after obtaining an order, which is not the case in the case on hand. Proviso (i) to Section 19(1) of the Act 51 of 1993 makes it crystal clear that the financial institution or the Bank should withdraw the Original Application already filed before the DRT, for the purpose of taking action under SARFAESI Act, thereby meaning, to initiate the proceeding under Section 13 of the SARFAESI Act, the withdrawal of O.A. pending before the DRT, is mandatory and no option is given for withdrawal or abandonment of the OA, after initiating action under Section 13(4) of the SARFAESI Act. For these reasons, in my considered opinion, the above Ruling also may not be helpful to the respondent, to say that the writ is not maintainable.

27. The submission of the learned senior counsel for the petitioner, placing reliance upon the following decisions, that though alternative remedy is available, questioning the illegal act of the respondents, by filing the writ, is not barred, has to be accepted in this case, considering the facts and circumstances of the case, as detailed by me supra.

28. In SANJANA M.WIG (MS) vs. HINDUSTAN PETROLEUM CORPORATION LTD. [(2005) 8 SCC 242], the Apex Court has observed:

> "The writ petition is maintainable when lis involves public law character and when the forum chosen by the parties would not be in a position to grant appropriate relief."

As indicated by me supra, under Section 17 of the Act 51 of 1993, DRT cannot decide certain irregularities pointed out and therefore, the alternative efficacious remedy chosen by the writ petitioner before this Court appears to be well maintainable.

29. In SALAHUDEEN BABU vs. P.T.PRABHAKAR AND OTHERS (2005-1-L.W.643), the Division Bench of this Court has ruled:

> "Alternative remedy cannot be rejected on the ground of technical plea to enforce the law of the land."

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30. In L.K.VERMA vs. HMT LTD. AND ANOTHER [(2006) 2 SCC 269], the alternative remedy available, under certain circumstances, is recognised by the Apex Court. Thus viewing the case from this angle also, it is to beheld, the writ petition is well maintainable.

31. In the light of the above discussion and considering the admitted facts, I should say, that the writ petition is well maintainable and the respondent's action, in initiating the proceedings under Section 13(4) of the SARFAESI Act, by the impugned order dated 20.2.2006, is violative of the law and therefore, the impugned order is liable to be quashed, allowing this writ petition.

In the result, the writ petition is allowed quashing the impugned proceedings of the respondent dated 20.2.2006. However, liberty is given to the respondent, if they are advised, to proceed under Section 13(2) followed by Section 13(4) of the SARFAESI Act, as contemplated under law, after withdrawing O.A.No.960 of 1998 filed before the DRT, Chennai, seeking permission of the DRT, as contemplated under Section 19(1) of the Act 51 of 1993. No costs.

Consequently, W.P.M.P.No.12516 of 2006 is closed and W.V.M.P.No.1118 of 2006 is dismissed.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

Rao

To

1. The Presiding Officer,
Debts Recovery Tribunal No.I,
Chennai.

2. The Deputy General Manager/Authorised Officer,
115, Annasalai, Saidapet, Chennai-15.

1 cc To Mr.J.Anandhavalli, Advocate, SR.42111.
1 cc To M/S.N.V.S.Associates, SR.41604.

Order in W.P.No.11009/2006,
WPMP.No.12516/2006 & WVMP.
No.1118/2006

GM(CO)
RVL 21.09.2006

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